Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHELDON I. MATZKIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

JUDITH A. ARCHER
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
New York, New York 10005

JOHN D. CLINE
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

FLOYD ABRAMS*
80 Pine Street
New York, New York 10005
(212) 701-3000

**Counsel of Record*
for Petitioner

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QUESTIONS PRESENTED

In this Court's seminal ruling in *Strickland* v. *Washington*, 466 U.S. 668 (1984), it established a two-prong test for determining when a claim of ineffective assistance of counsel may be credited. This case raises the following two questions:

1. Whether prejudice on direct appeal satisfies the "prejudice" prong of the ineffective assistance of counsel standard set forth in *Strickland*.

2. Whether, to establish prejudice under *Strickland*, the defendant must disprove the possibility that the jury "could have" convicted him in the absence of counsel's errors.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sheldon I. Matzkin ("Matzkin") respectfully submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 12, 1995, affirming the denial of Matzkin's motion pursuant to 28 U.S.C. § 2255 (1994).

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unreported; the opinion and order of the district court (App. 3a-6a) are unreported; the opinion of the court of appeals affirming Matzkin's conviction on direct appeal is reported at 14 F.3d 1014 and is reprinted in the Appendix hereto at 7a-21a; the opinion and order of the district court deny-

ing Matzkin's motion for a new trial (App. 22a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals of which petitioner seeks review was entered on April 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Section 3282 of Title 18, United States Code (1994), provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

Procedural History of This Action

On October 14, 1992, Sheldon I. Matzkin was indicted by a grand jury sitting in the Eastern District of Virginia. The indictment charged that Matzkin, an attorney practicing in the Washington, D.C. area, had paid Navy engineer Stuart Berlin for information concerning three Navy procurements in which Matzkin's clients were bidders. Count 1 of the indictment charged that Matzkin and Berlin engaged in a conspiracy spanning nine years—"[f]rom in or about 1979 through on or about June 14, 1988"—the objects of which were to defraud

and commit offenses against the United States. Indictment at 7. The offenses that Matzkin allegedly conspired to commit were charged separately in Counts 2 (bribery), 3 (bribery), and 4 (conversion) of the indictment. *Id.* at 16-20.

The statute of limitations applicable to all counts of the indictment was five years. 18 U.S.C. § 3282 (1994). Of the 26 overt acts alleged in Count 1, only ten alleged conduct occurring within the limitations period—that is, on or after October 14, 1987. The evidence at trial established that one of those ten overt acts occurred outside the limitations period. Of all the overt acts alleged to have occurred within the statute of limitations, only one charged conduct independent of the allegations in Counts 2, 3, and 4.

Matzkin's trial began on January 11, 1993. Matzkin's trial counsel, Thomas R. Dyson ("Dyson"), did not request a jury instruction on Count 1 of the indictment that the government was required to prove that at least one overt act occurred within the statute of limitations period.[1] The district court did not give a statute of limitations instruction. Instead, the court instructed the jury—three times—that it could convict Matzkin on Count 1 if it found "at least one of the overt acts charged in the indictment *at or about the time and place alleged.*" Transcript ("T.") 1/13/247 (emphasis added); *see* T. 1/13/244, 248. Dyson did not object to these instructions or to the lack of a statute of limitations instruction. T. 1/13/263.

The jury found Matzkin not guilty of Counts 2, 3, and 4, all the substantive counts of the indictment. The jury found Matzkin guilty of Count 1, the conspiracy count.

On January 29, 1993, Matzkin moved for a new trial, contending, *inter alia*, that Dyson's representation of Matzkin at

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[1] To satisfy the statute of limitations on a conspiracy charge under 18 U.S.C. § 371 (1994), the government must allege and prove an overt act in furtherance of the conspiracy within five years of the date of indictment. *See, e.g., Grunewald* v. *United States*, 353 U.S. 391, 396-97 & n.9 (1957); *United States* v. *Head*, 641 F.2d 174, 177 (4th Cir. 1981).

trial had been ineffective because of his failure to raise the statute of limitations issue by either requesting an appropriate instruction or objecting to the court's failure to give such an instruction. In support of that motion, Dyson submitted a sworn declaration (the "Dyson Declaration") acknowledging that his failure to assert Matzkin's rights under the statute of limitations or to request a jury instruction on that issue was the "product of an oversight." *See* Dyson Declaration ¶ 5. Dyson stated that he had "made no strategic or tactical decision to waive, relinquish or otherwise refrain from asserting defendant's rights under the statute of limitations," *id.*, and that "[a]t no time did I discuss with Mr. Matzkin either the statute of limitations or any strategic or tactical reasons for waiving or failing to assert its protections," *id.* ¶ 6. Dyson admitted that "my failure to perceive the statute of limitations issue and to request a jury instruction regarding the need to find an overt act within the limitations period rendered my assistance of Mr. Matzkin ineffective." *Id.* ¶ 8.[2] The United States, in opposing the motion, did not take issue with the truth of the Dyson Declaration and did not (and, to this time, does not) maintain that the failure of counsel to request the instruction was, to any extent, tactically rooted.

By order of February 18, 1993, the district court denied Matzkin's motion for a new trial, finding that Matzkin had waived the statute of limitations defense by his failure to object to the court's omission of the limitations issue from its charge. Order of Feb. 18, 1993, at 4, 7. (App. 23a) The court did not reach the merits of the ineffective assistance of counsel issue. On March 12, 1993, the district court sentenced Matzkin to 33 months' incarceration, a two-year term of supervised release, a fine of $30,000, and a $50 special assessment.

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[2] Dyson, a trial lawyer with 30 years of experience, stated that "I have never before asserted that my performance as counsel fell short of the effective assistance to which a criminal defendant is entitled." Dyson Declaration ¶ 9.

On direct appeal from the denial of Matzkin's motion for a new trial, the United States Court of Appeals for the Fourth Circuit affirmed Matzkin's conviction. *United States* v. *Matzkin*, 14 F.3d 1014 (4th Cir. 1994). (App. 9a) The court of appeals (like the district court) declined to address the merits of Matzkin's ineffective assistance of counsel claim; instead, the court directed Matzkin to pursue such a claim by motion under 28 U.S.C. § 2255. *Id.* at 1017. (App. 12a) The court also found no "plain error" by the trial judge. *Id.* at 1018. (App. 13a)

Matzkin's Motion Pursuant to 28 U.S.C. § 2255

On February 22, 1994, Matzkin filed a motion pursuant to 28 U.S.C. § 2255 to vacate the judgment and sentence entered against him based on ineffective assistance of counsel. Matzkin's motion addressed the two-prong standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), arguing that Dyson's performance had been deficient and that Matzkin had been prejudiced as a result of that deficient performance.

In support of his argument that Dyson's performance fell below an objective standard of reasonableness under *Strickland*, Matzkin offered the Dyson Declaration and an affidavit from Richard A. Hibey, Esq., an expert criminal defense attorney who had reviewed the trial and appellate record in the case. Hibey's opinion was that Dyson's failure to request the instruction "rendered his performance in Mr. Matzkin's defense of the conspiracy count *inexcusably ineffective*." Affidavit of Richard A. Hibey, Esq., sworn to February 22, 1994, at 3 (emphasis added). Hibey noted the well-established principle that to be convicted of conspiracy, a defendant must be found beyond a reasonable doubt to have committed an overt act in furtherance of that conspiracy within the five-year federal statute of limitations. *Id.* at 3. Since Dyson admittedly "completely missed" the timeliness issue, *id.*, Hibey concluded, Dyson "never exercised any judgment with respect to the relevance, importance, strategic value and use associated

with the [statute of limitations] instruction to which his client was entitled as a matter of law," *id.* at 4. In Hibey's opinion, "a lawyer competently defending the conspiracy count in this case had to have requested the limitations instruction." *Id.* at 5.[3] The government presented no expert affidavit or other evidence contravening either the Hibey Affidavit or the Dyson Declaration.

To satisfy the prejudice prong of *Strickland*, Matzkin contended that Dyson's error had prejudiced him at trial because Matzkin's acquittal on the three substantive counts, which embraced *all but one* of the 26 overt acts charged in the conspiracy count, strongly suggested that the government had not convinced the jury that the overt acts within the limitations period had occurred. Matzkin also argued that he had been prejudiced on direct appeal by Dyson's errors at trial, noting that a district court's failure to give a statute of limitations instruction under similar facts had required reversal of the defendant's conviction in *United States* v. *Head, supra*, 641 F.2d 174. Matzkin relied, as well, on *Government of the Virgin Islands* v. *Forte*, 865 F.2d 59 (3d Cir. 1989), which held that prejudice suffered by the defendant on direct appeal as a result of trial counsel's failure to object to the prosecutor's use of peremptory challenges to remove white jurors satisfied the *Strickland* standard.

The Decision of the District Court

By Opinion and Order dated March 22, 1994, the district court denied Matzkin's § 2255 motion. The district court stated that Dyson had mounted an "all-or-nothing" trial strat-

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[3] Several courts have concluded that the failure of a defense attorney to assert a statute of limitations defense may constitute ineffective assistance of counsel. *See, e.g.*, *People* v. *Gwinn*, 627 N.E.2d 699, 702 (Ill. App. Ct. 1994); *People* v. *Sifford*, 617 N.E.2d 499, 501-02 (Ill. App. Ct. 1993), *appeal denied*, 645 N.E.2d 1366 (Ill. 1994); *Commonwealth* v. *Purcell*, 589 A.2d 217, 233-35 (Pa. Super. Ct. 1991), *appeal denied*, 604 A.2d 248 (Pa. 1992); *Morgan* v. *State*, 847 S.W.2d 538, 543-44 (Tenn. Crim. App. 1992).

egy and that "[t]he issue of whether there was a time bar was therefore not unreasonably overlooked in the manner in which the case was defended." Memorandum Opinion of March 22, 1994, at 2. (App. 4a) Nonetheless, the court assumed for purposes of the motion that Dyson's performance had been deficient. (App. 4a) In examining whether Matzkin had been prejudiced, the district court failed to apply the standard established in *Strickland*—whether there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Instead, the district court examined whether the jury "could have" based its verdict on overt acts within the limitations period. (App. 5a) Finding that the jury "could have" convicted Matzkin based on overt acts within the limitations period, the district court found that Matzkin was not deprived of a fair trial or one whose result was reliable. (*Id.*) The district court also rejected Matzkin's argument that Dyson's failure to raise the statute of limitations issue had prejudiced him on direct appeal, finding that "this is no more than a deficient performance argument in a different form." (*Id.*)

The Decision of the Court of Appeals

Matzkin timely appealed to the Court of Appeals for the Fourth Circuit. On April 12, 1995, in an unpublished, *per curiam* decision, the court of appeals "affirm[ed] [the denial of Matzkin's § 2255 motion] on the reasoning of the district court." No. 94-6369, 1995 WL 215423, at *1 (4th Cir. April 12, 1995). (App. 2a)

REASONS FOR GRANTING THE WRIT

The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." U.S. Const. Amend. VI. This Court has long since established that the right to counsel is fundamental and essential to ensure a fair trial. *Powell* v. *Alabama*, 287 U.S. 45, 71-72 (1932); *Gideon*

v. *Wainwright*, 372 U.S. 335, 344 (1963). *See also Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986) ("The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.").

In *Strickland*, this Court reiterated these deeply rooted Sixth Amendment principles, emphasizing that the right to counsel is the right to effective assistance of counsel. 466 U.S. at 686. *Strickland* established a two-prong test that a defendant claiming ineffective assistance must satisfy. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. To satisfy this standard, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. This articulation in *Strickland* has been recognized by this Court and lower courts as the controlling test.

On numerous occasions since *Strickland*, this Court has stressed the importance of effective assistance of counsel and has reaffirmed the test set forth in that seminal decision. *See, e.g., Kimmelman* v. *Morrison*, *supra*, 477 U.S. at 371 ("[T]his Court announced the standards to be applied to claims of constitutionally deficient representation in *Strickland* v. *Washington*. . . ."); *Lockhart* v. *Fretwell*, 113 S. Ct. 838, 842 (1993) (analyzing counsel's conduct under "the *Strickland* test"); *Nix* v. *Whiteside* 475 U.S. 157, 164 (1986). This Court has since held the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious." *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). *See also United States* v. *Cronic*, 466 U.S. 648, 657 n.20 (1984).

I. THE FOURTH CIRCUIT'S REFUSAL TO CONSIDER PREJUDICE ON APPEAL CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *FORTE*

The Fourth Circuit rejected Matzkin's claim that Dyson's ineffective assistance caused him to suffer prejudice on direct appeal. The Fourth Circuit's action squarely conflicts with the Third Circuit's decision in *Forte*, *supra*, 865 F.2d 59. This Court has not addressed whether prejudice suffered by a defendant on direct appeal—rather than at trial—can satisfy the *Strickland* prejudice requirement. This Court should resolve the conflict between the Third and the Fourth Circuits and determine whether prejudice on direct appeal satisfies the *Strickland* standard.

In *Forte*, counsel for the defendant failed to object to the prosecutor's use of peremptory challenges to excuse virtually all of the white jurors called.[4] On direct appeal, Forte argued that his judgment of conviction should be vacated because his trial counsel's failure to challenge the government's use of peremptory challenges denied him effective assistance of counsel and that the district court committed plain error by failing to recognize the issue. *See Forte*, 865 F.2d at 61. The Third Circuit —like the Fourth Circuit on Matzkin's direct appeal —held that Forte had failed to preserve his objections and that the trial judge had not committed plain error. The Third Circuit noted that Forte could raise the effectiveness claim only in a collateral proceeding under 28 U.S.C. § 2255. *See Government of the Virgin Islands* v. *Forte*, 806 F.2d 73, 77-78 (3d Cir. 1986).

Forte—like Matzkin—filed a motion under 28 U.S.C. § 2255 alleging that his counsel had been ineffective at trial

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[4] Defense counsel in *Forte* had been advised that *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in which this Court held such a use of peremptory challenges unconstitutional, was then pending before the Court but nonetheless did not raise the *Batson* issue at trial. 865 F.2d at 61.

in failing to raise the *Batson* issue. The district court denied the motion, and Forte appealed. The Third Circuit, applying the *Strickland* two-part test, found that Forte's trial counsel's failure to object to the prosecutor's use of peremptory challenges was unreasonable under prevailing standards. 865 F.2d at 62. Turning to the prejudice inquiry under *Strickland*, the court found that Forte suffered no prejudice at trial. It nonetheless stated:

> "But we do not end our analysis at the trial for we think it also clear that had the objection been made Forte would have been successful on his direct appeal in having the matter remanded for a determination of whether there had been a *Batson* violation. When we rejected Forte's *Batson* claim, we did so because he had not preserved it, not because it was meritless."

865 F.2d at 64. The court held: "While we realize that ordinarily the *Strickland* principles are advanced when the contention is made that the trial cannot be relied upon to have produced a just result, we see no logical reason why they should not be applicable when the defendant was denied a just result on appeal because of the ineffectiveness of his attorney at the trial." *Id.* Because Forte had been prejudiced on direct appeal by his trial counsel's failure to preserve the *Batson* issue, the Third Circuit found that he had satisfied the second *Strickland* requirement. *See* 865 F.2d at 64-65.

The analysis of the *Forte* court is equally applicable here and should have been adopted by the Fourth Circuit. The Fourth Circuit's decision in *Head* makes clear that had Dyson objected to the district court's overt act instructions and requested an instruction on the statute of limitations, the failure by the court to give such an instruction and to limit the jury's consideration to overt acts within the limitations period would have mandated reversal on direct appeal. *See* 641 F.2d at 177-79. The only material difference between the reversal in *Head* and the affirmance on direct appeal here was Dyson's

failure to recognize and raise the limitations issue. Because it is reasonably probable that the Fourth Circuit (like the court of appeals on direct appeal in *Forte*) would have reversed Matzkin's conviction had Dyson preserved the limitations issue, Dyson's failure to raise that issue gravely prejudiced Matzkin's direct appeal. The prejudice requirement of *Strickland* is therefore satisfied. *Forte*, *supra*, 865 F.2d at 64-65.

The *Forte* court's recognition of appellate prejudice is consistent with *Strickland*, which determined that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings *as they do on direct appeal* or in motions for a new trial." 466 U.S. at 697 (emphasis added). This Court has recognized that because direct appellate review is an integral part of the adversarial process, a defendant has a right to effective assistance of counsel on direct appeal. *See Evitts* v. *Lucey*, 469 U.S. 387 (1985). It would be anomalous to hold that a defendant whose chance of success on appeal is prejudiced by counsel's errors at trial can not satisfy *Strickland*.

Forte cannot be reconciled with the Fourth Circuit's decision in this case. This Court's review of the decision below is necessary to resolve the conflict between the Circuits regarding whether appellate prejudice satisfies the second prong of *Strickland*.

II. THE COURT OF APPEALS' REQUIREMENT THAT MATZKIN DISPROVE THE POSSIBILITY THAT THE JURY "COULD HAVE" CONVICTED MATZKIN ABSENT COUNSEL'S ERRORS CONFLICTS WITH THIS COURT'S DECISION IN *STRICKLAND* AND THAT OF OTHER CIRCUITS

The Fourth Circuit—adopting the reasoning of the district court—rejected Matzkin's contention that Dyson's errors prejudiced him at trial because it found that the jury "could have" based its verdict on three overt acts within the limitations period. *See* App. at 5a; *see id.* (court does not find that overt

act 21—which was outside the limitations period—was the only overt act "upon which the jury could have rested its verdict"). The standard the court applied to determine whether Matzkin was prejudiced flatly ignores the standard this Court articulated in *Strickland* and has consistently reaffirmed. As *Strickland* recognized,

> "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."

466 U.S. at 695.

By requiring Matzkin to satisfy the onerous "could have" standard, the court of appeals placed itself squarely at odds with *Strickland* itself, which held that the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case" but need only show that the errors were significant enough to "undermine confidence in the outcome." 466 U.S. at 693, 694. *Strickland* explained that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Requiring *Matzkin* to prove that the jury "could have" relied on an overt act within the limitations period imposed on him a burden that this Court explicitly rejected in *Strickland*.

The Fourth Circuit's "could have" standard also conflicts with the repeatedly expressed view of other circuits. *See, e.g.*, *Baxter* v. *Thomas*, 45 F.3d 1501, 1512-15 (11th Cir. 1995); *Parkus* v. *Delo*, 33 F.3d 933, 938 (8th Cir. 1994); *Wade* v. *Calderon*, 29 F.3d 1312, 1323-25 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995); *United States* v. *Thompson*, 27 F.3d 671, 675 (D.C. Cir.), *cert. denied*, 115 S. Ct. 650 (1994);

United States v. *Castro*, 26 F.3d 557, 562 (5th Cir. 1994); *Mayo* v. *Henderson*, 13 F.3d 528, 534 (2d Cir.), *cert. denied*, 115 S. Ct. 81 (1994); *Osborn* v. *Shillinger*, 861 F.2d 612, 626 (10th Cir. 1988).

The lower court's application of the wrong standard is especially egregious in this case, where the evidence was so weak that the jury failed to convict Matzkin on any of the substantive counts of the indictment. As *Strickland* stated, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696.

The prejudice standard adopted by the court of appeals, if left uncorrected, would erect an almost insurmountable barrier to ineffective assistance claims. The Court should grant the writ to resolve the conflict between the Fourth Circuit's decision in this case and that of *Strickland* and the numerous other circuits that have passed upon the issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 10, 1995
New York, New York

Respectfully submitted,

FLOYD ABRAMS*
80 Pine Street
New York, New York 10005
(212) 701-3000

**Counsel of Record*
for Petitioner

Of Counsel:

JUDITH A. ARCHER
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
New York, New York 10005

JOHN D. CLINE
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000